87-1518



NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

---

STATE OF FLORIDA,

Petitioner,

v.

FLOYD MORGAN,

Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

ROBERT B. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASST. ATTORNEY GENERAL

DEPT. OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida
32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

## QUESTIONS PRESENTED

Whether the Florida Supreme Court's *sua sponte* drafting and granting of a collateral attack, without providing notice or argument to the State, violated due process.

## TABLE OF CONTENTS

## TABLE OF CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

---

STATE OF FLORIDA,

Petitioner,

v.

FLOYD MORGAN,

Respondent.

---

## PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

The Petitioner, State of Florida, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Florida entered in the case of Floyd Morgan v. State, August 27, 1987, rehearing denied December 22, 1987 and that a summary reversal obtain, instructing the Florida Supreme Court to properly review this case in accordance

with Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) after permitting all parties to this cause to file briefs and be heard in compliance with the Fifth Amendment to the Constitution of the United States

## OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at ____ So.2d ____ (Fla. 1987), but is attached as exhibit 1 to this petition. The two prior opinions of the Florida Supreme Court appear in Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, 459 U.S. 1055 (1982) and Morgan v. State, 475 So.2d 681 (Fla. 1985).

## JURISDICTION

The decision of the Florida Supreme Court was rendered on August 27, 1987 and rehearing was denied on December 22, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides *inter alia*:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment X provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

## STATEMENT OF THE CASE

Floyd Morgan, an inmate on Florida's "death row", collaterally attacked his judgment and sentence pursuant to Fla.R.Crim.P. 3.850. His first petition was denied as facially deficient. Morgan v. State, 475 So.2d 681 (Fla. 1985). His amended petition resulted in an evidentiary hearing and a second collateral appeal to the Florida Supreme Court.

Morgan's appeal addressed the issue of ineffective assistance of trial counsel. He specifically did not allege error under Lockett v Ohio, 438 U.S. 586 (1978) or Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987)[1] on the part of the

---

[1] These cases require sentencer to consider all mitigating evidence relevant to a defendant's character or history, if offered by the defendant.

trial court.[2] Briefs were filed by the parties and oral argument was held on the single issue of ineffective assistance of counsel.

After the briefing, after oral argument and without any notice to the parties, the Supreme Court, sua sponte, "amended" the petition to include a Lockett-Hitchcock claim and granted relief to Morgan.

The State of Florida vigorously protested this action. Mr. Morgan had raised a Lockett claim in his original appeal and lost on the merits. Morgan v. State, 415 So.2d 6 (Fla.) cert. denied, 459 U.S. 1055 (1982). Five of the seven justices now on the Florida Supreme Court

---

[2] We note that in Burger v. Kemp, U.S. ___, 1 F.L.W. Fed. S 1049 (1987), this Court held that a claim of ineffective assistance of counsel did not preserve a "Hitchcock" claim for your review.

did not participate in that original appeal and thus never heard or considered the State's arguments. Florida pleaded with the new justices for leave to be heard. The court refused to permit the State to be heard, orally or in writing.

Had the State been given a fair opportunity to be heard, the State would have shown that the defendant (Morgan) was in prison for second degree murder, reduced from first degree despite the fact that Morgan's crime (driving a wooden shaft up the victim's rectum) was as brutal as the stabbing at bar. (R 518, 808) While Morgan relied heavily upon his "prison adjustment" (saving a guard during a riot) the State would have shown that Morgan was regularly in trouble for possession of illegal weapons and possession of "negotiables" in prison. (R 256-257)

Morgan, somehow, became a $400 "creditor" of the victim (Saylor) while the two were inmates. Morgan killed Saylor because Saylor would not pay up. Arguably, all of Morgan's actions were directed towards protection or enhancement of his illicit prison activities. Since all facts and all inferences from the facts are taken in favor of the appellee (State) on appeal, these arguments would be proper. The State, however, was not permitted to raise them to the court, including the five new justices.

## REASON FOR GRANTING THE WRIT

### WHETHER THE FLORIDA SUPREME COURT'S SUA SPONTE DRAFTING AND GRANTING OF A COLLATERAL ATTACK, WITHOUT PROVIDING NOTICE OR ARGUMENT TO THE STATE, VIOLATED DUE PROCESS

The question at bar is simple: Does a state have the right to due process of law? The Petitioner urges that it does, and that its' constitutional rights and those of its citizens have been and will continue to e violated absent corrective action.

Pursuant to Rule 17(c) when a state court decides an important question of federal law which is unsettled or which has not been, but should be, decided by this Court certiorari may be granted. This is particularly true if special and important reasons for granting the writ are present. We suggest that such reasons are present in this case.

There is no question that certiorari

would, and should, be granted in a case where a defendant was denied notice of the charges (civil or criminal) filed against him, or the right to respond to the charges, to address the evidence or to argue his case. Indeed, certiorari would be granted even in the event of a summary denial of these rights, without opinion, by the lower court. The defendant's Fifth and Sixth Amendment rights would be so clearly violated that the "importance of the issue", see Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975) would prompt this Court's intervention.

The State, obviously, is not an individual, prompting some to opine that state's do not have "due process" rights. As a result, the public (represented by the state) can be denied notice, the right to confront charges, the right to confront evidence and the right to appeal and

represent the public's interest in criminal cases. We submit that these abuses can and do occur with sufficient frequency[3] and our entreaty to the Supreme Court of Florida has been so fully rejected, that certiorari should be granted despite the absence of conflict, Pernell v. Southall Realty, 416 U.S. 363 (1974); Davis v. Alaska, 415 U.S. 308 (1973), given the presence of an important due process issue. See e.g. Williams v. Kaiser, 323 U.S. 471 (1944); Tomkins v. Missouri, 323 U.S. 485 (1944).

The States have an undeniable interest in criminal proceedings even on collateral review, Wainwright v. Sykes, 433 U.S. 72 (1977) and this Court has at least once recognized that states are entitled to

---

[3] Foster v. State, (petition for certioarari to be filed); State v. Meyer, 430 So.2d 440 (Fla. 1983)

"justice". Snyder v. Massachusetts, 291 U.S. 97 (1933). Despite this decision, a state may be victimized, as here, by an entirely ex parte adjudication of its rights and interests, without recourse.

The problem is not merely "episodic", Rice v. Sioux City Cemetary, 349 U.S. 70 (1954), nor does it involve an issue of "state law".[4] It is a significant problem which manifests itself in a myriad of ways, all capable of repetition yet evading review. Gerstein v. Pugh, supra. Here, Florida was not given notice or argument on a claim of reversible error. In State v. Meyer, 430 So.2d 440 (Fla. 1983), the court

---

[4] While the Florida Supreme Court may examine an entire record for "error" on direct review, collateral attack can not serve as a "second appeal". Tafero v. State, 459 So.2d 1034 (Fla. 1984). Florida has a recognized procedural default doctrine governing collateral review. Wainwright v. Sykes, supra, as well.

relaxed adherence to the rules of procedure for the defense bar while holding the state to the rules. Cases coming before the courts pursuant to Anders v. California, 386 U.S. 738 (1967) are being resolved by the courts (of Florida) after ex parte judicial review, and without notice or opportunity for argument being given to the State.

We submit that if the due process clause of the Fifth Amendment, applicable "to" the state under the Fourteenth Amendment does not apply to the states to the extent it affords them "due process" rights while in court, then the reservations clause of the Tenth Amendment should.

There is, of course, no logical basis for a system which denies to the people collectively rights which would have to be respected individually. The state, in

criminal prosecutions, is the ad litem representative of the people. While it may be compelled to carry the burden of proof, it can not be denied equal and fair access to the courts.

These continuing abuses of due process combine, we suggest, to provide the special and important basis necessary for the granting of certiorari.

## CONCLUSION

Nothing can be more fundamental to our concept of justice than the right to notice,to appear in court and to defend oneself. Every one of these rights have been denied to the State of Florida, thus depriving its citizens collectively of rights which would be respected individually.

The Petitioner is not asking for Supreme Court review of the underlying case. Rather, it is seeking protection of its simple right to due process of law. It is for this reason certiorari is requested.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Asst. Attorney General

DEPT. OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida
32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Weinberg, Esq., and Dianne Smith, Esq., WILLIAMS & CONNOLLY, 839 - 17th Street, N.W., Washington, D.C. 20006; and Larry Helm Spalding, Esq., Office of Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this _____ day of February, 1988.

MARK C. MENSER
Asst. Attorney General

OF COUNSEL

# Appendix

SUPREME COURT OF FLORIDA

---

No. 69,104

---

FLOYD MORGAN, Appellant,

v.

STATE OF FLORIDA, Appellee.

[August 27, 1987]

PER CURIAM

This case is an appeal from the denial of a motion for post-conviction relief filed under Florida Rule of Criminal Procedure 3.850. Because this case involves the imposition of the sentene of death, following a conviction of first degree murder, this Court has jurisdiction to review the trial court order. Art. V, section 3(b)(1), Fla.Const. We reverse and remand the case for resentencing in a proceeding consistent with this opinion.

The appellant was convicted of the first degree murder of a fellow inmate at Union Correctional Institute. Following a jury recommendation, by a seven to five vote, the trial judge sentenced the appellant to death. On direct appeal, this Court affirmed the judgment of conviction, as well as the sentence. Morgan v. State, 415 So.2d 6 (Fla. 1982), cert. denied, 459 U.S. 1055 (1982). The appellant filed a motion for post-conviction relief, which was denied without hearing. This Court reversed that order and remanded the case to the trial court to take evidence on the motion. Morgan v. State, 475 So.2d 681 (Fla. 1985). On remand, the trial court held an evidentiary hearing and then denied the motion. The appellant now appeals the order denying his Rule 3.850 motion.

On appeal, the appellant asserts two arguments for reversal. The first argument

is that the United States Supreme Court decision in Hitchcock v. Dugger, U.S. ____, 107 S.Ct. 1821 (1987) requires this Court to reverse the capital sentence. Because of our disposition on that issue, we need not reach appellant's second argument, namely that he was deprived effective assistance of counsel during his capital sentencing proceeding.

In the Hitchcock sentencing hearing, the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following . . ." 107 S.Ct. at 1824. The judge then listed the enumerated, statutory mitigating circumstances which the jury was permitted to consider in rendering its advisory sentence. As the Court in Hitchcock noted, there is no doubt that the trial judge felt restricted to those statutory mitigating factors.

The trial judge in this case in the proceedings below, instructed the jury in precisely the identical manner. Using the same language, the court expressly precluded the jury from considering any factors except those enumerated in section 921.141(6). Moreover, the court, in its order sentencing the appellant to death, examined the list of statutory mitigating circumstances and determined that none were applicable. Nowhere in his order is there any reference to any nonstatutory mitigating evidence proffered by the appellant. The state argues that there is no evidence that the trial court refused to consider such nonstatutory mitigating circumstances. We disagree with this view of the record. Our reading of the record leads to one conclusion. That is, that nonstatutory mitigating factors were not taken into account by the trial court, as

required by Lockett v. Ohio, 438 U.S. 586 (1978), and now Hitchcock.

The Supreme Court in Hitchcock found this failure to consider nonstatutory mitigation to be dispositive:

> We think it could not be clearer that the advisory jury was instructed not to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978).

107 S.Ct. at 1824. Here, as in Hitchcock, it is clear that the trial judge did not allow for consideration of nonstatutory mitigating circumstances.

While it is true that the appellant was permitted to proffer evidence to rebut, explain, or refute aggravating circumstances presented by the state, this

does not comport with the requirements of Lockett or Hitchcock. Such a limit on the admission of nonstatutory mitigating evidence places the proffering of that evidence entirely within the control of the prosecution. This we will not permit. It is abundantly clear from the record that the jury was not able to consider, and the trial judge did not take into account, any evidence of nonstatutory mitigating circumstances.

This error may not be considered harmless in light of the close nature of the jury recommendation one of death rather than mercy. Under such, and other circumstances, the failure to consider nonstatutory mitigating factors can not be termed harmless error.

Because our determination that the appellant is due a new sentencing hearing, we need not address the issue of whether

appellant was deprived effective assistance of counsel at the original sentencing proceeding. Any claim of ineffectiveness is mooted by our granted of a new sentencing proceeding.

The order of the court below, denying the appellant's 3.850 motion is hereby reversed. We remand this case with directions to vacate the sentence of death and conduct, with a new jury, a sentencing proceeding consistent with this opinion.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Alachua County,

Theron A. Yawn, Jr., Judge - Case No. 77-141-CF

Robert L. Weinberg and Dianne J. Smith of Williams & Connolly, Washington, D.C.; and Larry Helm Spalding, Capital Collateral Representative, Tallahassee, Florida,

for Appellant

Robert A. Butterworth, Attorney General, and Mark C. Menser, Assistant Attorney General, Tallahassee, Florida,

for Appellee.

SUPREME COURT OF FLORIDA

Tuesday
Dec. 22, 1987

FLOYD MORGAN,
Appellant,

v. CASE NO. 69,104

STATE OF FLORIDA,

Appellee. Cir. Ct. No.
77-141-CF
(Union County)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellee, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that the Motion for Stay of Mandate is granted and proceedings in this Court and in the Circuit Court of the Eighth Judicial Circuit, in and for Union County, Florida, are hereby stayed to and

including February 20, 1988, to allow appellee to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST

Sid J. White
Clerk Supreme Court.

TC
cc: Hon. Margie Cason,
Clerk
Hon. Theron A. Yawn,
Jr., Judge

Larry Helm Spalding,
Esq.
Robert L. Weinberg,
Esq.
Dianne J. Smith,
Esq.
Mark C. Menser, Esq.

ORIGINAL



No. 87-1518

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF FLORIDA,

Petitioner,

v.

FLOYD MORGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

# RESPONDENT'S BRIEF IN OPPOSITION

Robert L. Weinberg
Counsel of Record

Dianne J. Smith
John D. Cline

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
(202) 331-5000

Attorneys for Respondent
Floyd Morgan

May 9, 1988

## QUESTION PRESENTED

Whether the State of Florida can claim the protection of the Fourteenth Amendment due process clause against action by the Supreme Court of Florida.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

---

No. 87-1518

---

STATE OF FLORIDA,

Petitioner,

v.

FLOYD MORGAN,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

## STATEMENT OF THE CASE

At the penalty phase of Floyd Morgan's 1978 murder trial, the Florida trial judge instructed the advisory jury that the mitigating circumstances it could consider in deciding whether to recommend death or life imprisonment "shall be" the seven circumstances specified in Fla. Stat. § 921.141(6) (1977) (amended 1985). The jury recommended death by a 7-5 vote. The trial court adopted the jury's recommendation, making clear that

its consideration of mitigating circumstances was limited to those specified in § 921.141(6). Pet. App. A-4.[1/]

Following an unsuccessful appeal,[2/] Morgan filed a motion for post-conviction relief in Florida state court pursuant to Fla. R. Crim. P. 3.850. At the evidentiary hearing on his motion,[3/] Morgan introduced substantial evidence of mitigating circumstances that could have been presented to the trial court at the guilt phase of Morgan's trial.

The trial court denied Morgan's motion, and Morgan appealed to the Supreme Court of Florida. Morgan's brief on appeal argued in part that the trial court's refusal to consider nonstatutory mitigating circumstances required resentencing:

> If this Court does not conclude that Morgan's counsel rendered constitutionally ineffective assistance of counsel at the penalty phase of Morgan's trial . . . it should order new sentencing proceedings on the ground that Morgan was denied the opportunity to present evidence of nonstatutory mitigating circumstances at his trial in 1978. This Court has recently decided that an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute [Fla. Stat. § 921.141] in determining whether to impose a sentence of death or life imprisonment. Harvard v. State, 486 So. 2d 537 (Fla. 1986).

---

1/ The appendix to the petition for certiorari will be cited as "Pet. App." The petition itself will be cited as "Pet."

2/ Morgan v. State, 415 So. 2d 6 (Fla.), cert. denied, 459 U.S. 1055 (1982).

3/ The trial court initially denied the motion without a hearing. The Supreme Court of Florida reversed the trial court's decision and remanded for an evidentiary hearing. Morgan v. State, 475 So. 2d 681 (Fla. 1985). Inexplicably, the State cites this ruling in Morgan's favor for the proposition that Morgan's "first petition was denied as facially deficient." Pet. 4.

Initial Brief of Defendant/Appellant Floyd Morgan, at 49 n.19. The State chose not to address this contention in its opposing brief.[4/]

Several months after Morgan filed his final brief in the Supreme Court of Florida, but before oral argument, this Court decided Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).[5/] In Hitchcock, the Court reversed the denial of a writ of habeas corpus where a Florida trial judge had instructed the advisory jury that the jury's consideration of mitigating circumstances was limited to the seven circumstances specified in Fla. Stat. § 921.141, and had refused to consider nonstatutory mitigating circumstances in acting on the jury's recommendation of death. See 107 S. Ct. at 1824.

Counsel for both parties devoted considerable attention to Hitchcock in oral argument before the Supreme Court of Florida. Morgan's counsel, building upon the argument in Morgan's initial brief, contended that Hitchcock and McCrae v. State, 510 So. 2d 874 (Fla. 1987),[6/] required that the Rule 3.850 motion be granted and the case remanded for resentencing.

---

4/ The State did note in its brief that it "rejects each and every contention of the defense. If some obscure point is not specifically denied, or contested, elsewhere in this brief it is rejected here." Answer Brief of Appellee, at 12.

5/ Morgan filed his reply brief on December 19, 1986. Hitchcock was decided April 22, 1987. Oral argument on Morgan's appeal was held before the Supreme Court of Florida on June 30, 1987.

6/ In McCrae, decided shortly before the oral argument in Morgan's case, the Supreme Court of Florida vacated a death sentence on the basis of this Court's decision in Hitchcock.

Counsel pointed out that the jury instructions found unconstitutional in Hitchcock were virtually identical to those given at the penalty phase of Morgan's trial.[7/]

In response to questions from the court, counsel for the State devoted more than four minutes of his argument to Hitchcock and the issue of nonstatutory mitigating circumstances.[8/] Although the State conceded that the jury instructions rejected in Hitchcock were indistinguishable from those given at Morgan's sentencing trial, it nevertheless argued at length that Hitchcock did not control Morgan's case. Despite the State's offer to submit a supplemental brief on a Florida case addressing the nonstatutory mitigating circumstances issue, it never did so.

The Supreme Court of Florida held unanimously that Morgan was entitled to resentencing under Hitchcock. Morgan v. State, 515 So. 2d 975 (Fla. 1987) (per curiam), reprinted at Pet. App. A-1 to A-7. The State moved for rehearing on the grounds, inter alia, that Morgan had not raised the Hitchcock argument before the Supreme Court of Florida and that Hitchcock did not control Morgan's case. In response to the State's motion, Morgan pointed out that he had raised the Hitchcock issue in his initial brief and that both sides had discussed Hitchcock in detail during oral argument. The Supreme Court of Florida denied the State's motion for rehearing. Pet. App. A-9.

---

7/ Morgan has lodged with this Court a copy of the Florida Supreme Court tape recording of the oral argument in this case. The discussion of Hitchcock occurs approximately midway through the opening argument of Morgan's counsel.

8/ See supra note 7. The discussion of Hitchcock by counsel for the State occurs at the beginning of his argument.

## REASONS FOR DENYING THE WRIT

As the State acknowledges in its petition, Pet. 10, the decision of the Supreme Court of Florida does not conflict with the decision of any other state or federal court. Nor does the petition present any significant unsettled issue deserving of this Court's attention. Even if the State's factual claims were correct--which they are not--the State's assertion that the action of its own Supreme Court deprives the State of a protected interest[9/] without due process of law simply ignores the well-settled principle that a state is not a "person" entitled to the protection of the Fourteenth Amendment.

### I. THE STATE HAD AN AMPLE OPPORTUNITY TO ADDRESS THE HITCHCOCK ISSUE BEFORE THE SUPREME COURT OF FLORIDA.

The State's claim that it was denied due process rests upon its erroneous assertion that "[b]riefs were filed by the parties and oral argument was held [in the Supreme Court of Florida] on the single issue of ineffective assistance of counsel." Pet. 5. In fact, Morgan argued in his initial brief to the Supreme Court of Florida that the trial court had improperly refused to consider nonstatutory mitigating circumstances, and both Morgan and the State addressed Hitchcock during oral argument. Indeed, the State alone devoted more than four minutes of its argument to the Hitchcock issue. The State addressed Hitchcock again in its unsuccessful motion for rehearing. Thus, the State misstates the record when it claims that the Supreme

---

9/ The State does not specify in its petition exactly what the Supreme Court of Florida deprived the State of--life, liberty, or property. Clearly, the action of the Supreme Court did not deprive the State of "life"; similarly, it is difficult to see that the State has lost "property" through its inability to execute Morgan. Perhaps Florida is contending that the action of the Supreme Court of Florida deprived the State of a previously unrecognized liberty interest in executing its citizens.

Court of Florida "refused to permit the State to be heard, orally or in writing," on the Hitchcock issue. Pet. 6. The issue was squarely presented to the court and addressed by the parties.

## II. THE STATE OF FLORIDA IS NOT A "PERSON" ENTITLED TO CLAIM THE PROTECTION OF THE FOURTEENTH AMENDMENT.

Apart from the erroneous factual assertions that underlie the State's claim, its legal position is without merit. It is well-settled that the State of Florida is not a "person" entitled to claim the protection of the Fourteenth Amendment.

Sixty-five years ago this Court held that a political subdivision of a state could not claim the protection of the Fourteenth Amendment against that state. City of Trenton v. New Jersey, 262 U.S. 182, 190-92 (1923). Ten years later, the Court reaffirmed this principle. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933). Since these two decisions, federal and state courts have uniformly held that a state is not a "person" entitled to claim the protection of the Fourteenth Amendment. See, e.g., Pennsylvania v. Porter, 659 F.2d 306, 314 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982); Wisconsin v. Zimmerman, 205 F. Supp. 673, 675 (W.D. Wis. 1962); State ex rel. New Mexico State Highway Commission v. Taira, 78 N.M. 276, 430 P.2d 773, 778 (1967).

These decisions accord with the purpose of the Fourteenth Amendment. That Amendment was intended to protect the individual, not the state. See Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976) (equal protection clause of the Fourteenth Amendment "protect[s] people, not States"); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (Fourteenth Amendment creates "personal rights" against state action). The Fourteenth Amendment was not intended to regulate disputes between one branch of a state's government and another branch. Cf. Highland Dairy Farms v.

Agnew, 300 U.S. 598, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). If the executive branch of Florida has a dispute with the judicial branch of Florida over whether correct state procedures were followed, that is a matter to be resolved by the state government of Florida, not by this or any other federal court.[10/]

The State of Florida, under well-established law, is not a "person" entitled to the protection of the Fourteenth Amendment. Florida's claim to the contrary is not worthy of consideration by this Court.

## CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. WEINBERG
Counsel of Record

DIANNE J. SMITH
JOHN D. CLINE

WILLIAMS & CONNOLLY

Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Attorneys for Respondent
Floyd Morgan

---

10/ The State's reliance on the Tenth Amendment, Pet. 12, is particularly odd. The Tenth Amendment may or may not limit the extent to which the federal government can regulate the affairs of state government, e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), but it clearly does not empower the federal government to undertake such regulation.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of May 1988 I caused the foregoing Respondent's Brief in Opposition to be served by first-class mail, postage prepaid, upon the following: Mark C. Menser, Esquire, Assistant Attorney General, Dept. of Legal Affairs, The Capitol, Tallahassee, Florida 32399.

Robert L. Weinberg

NO. 87-1518

SUPREME COURT OF THE UNITED STATES

October Term 1987

---

**STATE OF FLORIDA,**

Petitioner,

v.

**FLOYD MORGAN,**

Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

# PETITIONER'S REPLY BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

## QUESTION PRESENTED

Whether the Florida Supreme Court's **sua sponte** drafting and granting of a collateral attack, without providing notice or argument to the State, violated due process.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**OTHER AUTHORITIES**

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

---

**STATE OF FLORIDA,**

Petitioner,

v.

**FLOYD MORGAN,**

Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

The Petitioner, State of Florida, submits for the Court's consideration this reply to certain arguments and statements of facts raised in the Respondent's Brief in Opposition.

## OPINIONS BELOW

The Petitioner's original statement is relied upon.

## JURISDICTION

The Betitioner's original tatement is relied upon.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner's original statement is relied upon.

## STATEMENT OF THE CASE

The Petitioner is compelled to correct misstatements of fact contained in Mr. Morgan's response so that this Court will not be misled.

**First,** Morgan did not raise a claim of error under **Lockett v. Ohio,** 438 U.S. 586 (1978) or **Hitchcock v. Dugger,** U.S. _____, 107 S.Ct. 1821 (1987). The touted footnote at page 49 of a 50 page

brief (on the singular issue of ineffective assistance of counsel), does not raise **Lockett** at all. Rather, it states that counsel's failure to present evidence to the trial judge deprived him of **"Lockett"** evidence. That is not the same thing as raising **"Lockett"** error **per se.**

**Second,** the tape recorded oral argument contains a request by Morgan's counsel for leave to "amend orally" the "3.850" petition, on appeal, to **add** a **"Hitchcock"** claim as a new, alternate, theory or claim for relief. Thus, the same lawyer who now claims he briefed **Lockett** and **Hitchcock** did not maintain that position before the Florida Supreme Court.

**Third,** when this attorney began to present the State's case he was immediately interrupted with questions regarding **Hitchcock** posed by the same two justices (Kogan and Overton) who raised the issue

during Morgan's argument. Counsel was required to answer the questions. That ambush, however, was not tantamount to notice and the right to prepare and present a cogent argument. Counsel for the State, the tape shows, directed the **"Hitchcock-Lockett"** questions into an argument of "no prejudice" under the prejudice prong of **Strickland v. Washington**, 466 U.S. 688 (1984). Counsel argued that defense (trial) counsel was aware of **Gregg v. Georgia**, if not **Lockett**, and that valid strategic grounds existed for not presenting the so-called "non-statutory mitigating evidence". That argument was not **"Hitchcock"** argument.

Justices Kogan and Overton raised **"Hitchcock"** for the first time at oral argument on behalf of Mr. Morgan. Morgan did not raise it and the State was denied a fair opportunity to argue the issue.

## REASONS FOR GRANTING THE WRIT

Mr. Morgan's response contends that the Petitioner is not entitled to certiorari because the State, in fact, argued **"Hitchcock"** and because the State is not entitled to due process of law. He is wrong on both counts.

As reported above, the **"Hitchcock"** issue was never raised in the trial court, nor was it briefed on appeal. Morgan's footnote does not address the jury instruction issue which stands at the base of **Hitchcock** nor does it allege **"Lockett** error" (which is distinct from **"Hitchcock** error") by the Court. What the footnote says is that trial counsel's failure to produce **"Lockett"** evidence deprived the court of evidence it would have ordinarily considered.

Morgan cites no authority, and cannot do so, for the proposition that the mention

of **Lockett** in the course of arguing "ineffective assistance of counsel" somehow preserves all variations of **"Lockett"** and **"Hitchcock"** error for review. Even if Morgan had intended to argue **"Lockett"** or **"Hitchcock"** in a footnote to a claim of ineffective assistance of counsel, he could not do so. In Florida, legal issues that are to be relied upon as a basis for relief must be separately identified and briefed. They cannot be sneaked into a brief, in a footnote, under a different heading. This tactic has been sanctioned as unprofessional practice and claims raised in this manner have been disallowed. **Singer v. Borbua,** 497 So.2d 279 (Fla. 3rd DCA 1986); **Lynch v. Tennyson,** 443 So.2d 1017 (Fla. 5th DCA 1983); **McClendon v. International House of Pancakes,** 381 So.2d 728 (Fla. 1st DCA 1980); Fla.R.App.P. 9.210(b)(5), see also

**Florida Citrus Commission v. Owens,** 239 So.2d 840 (Fla. 4th DCA 1970); **Anderson v. State,** 215 So.2d 618 (Fla. 4th DCA 1968).

The State submits that learned counsel for Mr. Morgan did **not** behave unprofessionally because counsel did **not** raise a **Hitchcock** claim. Morgan's present argument is simply an opportunistic attempt to fluff up "facts" to support an untenable position - and he knows it.

Morgan's claim that the people are not entitled to due process of law essentially proves the need to grant certiorari in this case. In **Snyder v. Massachusetts,** 291 U.S. 97 (1933), this Court held that a state is specifically, "also", entitled to "justice". Yet, in actions capable of repetition, yet evading review, see **Gerstein v. Pugh,** 420 U.S. 103 (1975), lower federal courts and some state courts are saying that "justice" is a one

way street, and that the people do not have the same due process rights collectively that they enjoy individually. Thus, while this Court says "the people" have rights, lower courts say they do not.

Mr. Morgan attempts to relate the case at bar to those portions of the Fourteenth Amendment relating to "life, liberty or property" (disregarding "equal protection of the law", curiously), ridiculing the State for suggesting it has rights. This argument can and will be answered if certiorari is granted.

Mr. Morgan attempts to compare disputes between political subdivisions of a state and the state itself, to this case, but cannot do so. Florida itself and Floyd Morgan are the litigants.

Finally, Morgan suggests that the problem between the people of Florida and the Florida Supreme Court is one to be

resolved by the state - but does not say "how". Civil liberties simply cannot be suspended by a state, or a court, until enough people are injured to finally force some political or electoral action. Even political responses by the State will not resolve the due process issue.[1]

---

[1] We note that since this petition was filed, Florida was denied due process in the **ex parte** handling of a federal habeas corpus petition in **Dugger v. Johnson**, U.S. _____, (March 15, 1988), Case No. A-698.

## CONCLUSION

Mr. Morgan has conceded the existence of a constitutional issue which he cannot avoid by distorting or restating the facts. The issue is due process and the violation is at hand. Certiorari review is necessary.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER